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NO. 87-1613

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court Of
New Hampshire

OBJECTION OF APPELLEE, MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND RESPONSE TO BRIEF AMICUS CURIAE OF THE EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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Now comes Appellee, Michael W. Holmes, Consumer Advocate (hereinafter the Office of

the Consumer Advocate or OCA)[1] and pursuant to Supreme Court Rule 36.3 objects to the Motion For Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Committee of Equity Security Holders of Public Service Company of New Hampshire (the Equity Committee) and in support thereof says:

1. The Motion of the Equity Committee fails to "... set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case

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[1] The OCA is an agency of the State of New Hampshire authorized to represent the interests of New Hampshire residential utility consumers before the New Hampshire Public Utilities Commission and any state or federal agency or court in which the interests of the residential utility consumers are involved. N.H. Rev. Stat. Ann. 363:28 (Supp. 1987). Appellee, Michael W. Holmes, has served as the Consumer Advocate of New Hampshire since 1983.

...." Sup. Ct. R. 36.3.

2. On January 28, 1988, Public Service Company of New Hampshire (PSNH or Company) sought protection from its creditors under Chapter 11 of the United States Bankruptcy Code (See Case No. 88-00043, U.S. Bankruptcy Court for the District of New Hampshire). No trustee has been appointed pursuant to 11 U.S.C. section 1104. The management appointed by the members of the Equity Committee is still operating the Company, and counsel hired by them prepetition are still representing the Company post petition.

3. The arguments of the Equity Committee are the same as those of Counsel of Record for the Company and its interests are adequately protected by him. Should the

Equity Committee believe differently, then they should take appropriate action in the United States Bankruptcy Court. The OCA, in accordance with Justice Brennan's order of April 22, 1988, will file a Motion to Dismiss on or before May 16, 1988, which will address the arguments of the Equity Committee and Counsel of Record in greater detail.

4. "The essence of the [Equity Committee's] position in this interlocutory transfer is not, ... the [Committee's] desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. [The Committee] seeks, rather nothing less than allocation of the risk back to ratepayers now that the risk of inoperative investment has materialized." Petition of Pub. Serv. Co. of N.H., 130 N.H. ___, ___ A. 2d ___ (January 26, 1988), slip opinion at 10.

> "That is, failure to recover the cost of a completed but non-functioning plant is one of the risks that a higher rate of return compensates the investors for bearing. That risk has materialized; and now by asking that CWIP be included in rate base the Company is asking to shift the risk back to the ratepayer. The Company and its investors have received compensation for the risks they have assumed through an enhanced rate of return, and here seek relief from those risks now that they have come to pass. Essentially, the Company seeks a bailout. With or without anti-CWIP, the State and Federal Constitution do not allow the Company to have it both ways." Id. at 10.

"Ratepayers cannot be required both to carry this risk and pay the Company for carrying it" Washington Gas Light Co. v. Baker, 188 F. 2d 11 (D.C. Cir. 1950), cert denied, 340 U.S. 952 (1951).

5. If a non-regulated company embarked on a new capital project to build a factory that would produce a new sports car, the automobile company, in a competitive market, would ordinarily be unable to force its customers to pay for cars never delivered. N.H. Rev. Stat. Ann. 378:30-a (1984) (anti-CWIP statute) "... protects consumers from having to pay for service not received, something which they would not be subjected to in a competitive industry." Northern Indiana Pub. Serv. Co. v. Citizen's Action Coalition, 485 N.E. 2d 610, 615 (Ind. 1985), appeal dismissed, 106 Sup. Ct. 2239 (1986). The Constitution no longer provides any special protection for the utility investor. Dayton Power & Light Co. v. Pub. Util. Comm'n, 447 N.E. 2d 733, 740 (Ohio 1983). In accord, Cleveland Elect. Ill. Co.

v. Pub. Util. Comm'n, 447 N.E. 2d 746 (Ohio 1983) appeal dismissed, 464 U.S. 802 (1983). The residential ratepayers of PSNH are not required to bailout the equity holders of the Company any more than the State is required to bailout the investors in a non-regulated company. Risk of loss and financial failure is upon the investors of PSNH to the same degree as in private enterprise.

6. Should the Court overturn the anti-CWIP statute, the PUC not the Legislature would then have discretion to award rates based on CWIP after it lowers the Company's rate of return. In order for the members of the Equity Committee not be "wiped out", the Court must not only declare N.H. Rev. Stat. Ann. 378:30-a (1984) unconstitutional, but order that ratepayers pay and keep on paying

for Seabrook without limitation. Will the 350,000 PSNH customers find any relief in the United States Bankruptcy Court? How can the equity holders expect a State with less than one million people to pay the over $2 billion invested in Seabrook, and to also bear the cost of power that will have to be purchased to replace that which was to be supplied by Seabrook. It was the equity holders who liquidated the Company to complete Seabrook. It was they who decided to issue securities with yields of 23%. See Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986). It was the Equity Committee that took full advantage of the New Hampshire State Constitution's blank check privileges with respect to utility financing. See Appeal of Pub. Serv. Co. of N.H., 122 N.H. 1062, 454 A.2d 435 (1982). It should be the Equity Committee that bears

the loss for their own decisions. To do otherwise is to render the Federal Constitution's protection of consumers from "exploitative" rates meaningless. To focus on this Company's self-inflicted financial condition is not consideration of the "end result" of a rate order, if that financial condition is the result of a process which balances the interests of consumers and investors. The anti-CWIP statute is the quid pro quo for the "vested" right to build. See Appeal of Pub. Serv. Co. of N.H., supra. If PSNH obtains a commercial operating license for Seabrook, it will be legally entitled to charge consumers for every penny prudently spent on that plant, regardless of how high rates may become and the resulting economic consequences to its customers.

7. PSNH has such a large investment in Seabrook (three times total non-Seabrook assets) that the Court's decision in FPC v. Hope Gas Co., 320 U.S. 591 (1944) will enable it to charge whatever the traffic will bear. The only impediment is that it must get this highly complex and innovative technology to work according to the regulations of the Nuclear Regulatory Commission. From the residential utility consumers viewpoint that hardly seems inequitable.

8. In New Hampshire the regulatory process balances the interests of ratepayers and investors by providing each what amounts to equal exposure to financial hardship. Risk of loss passes to consumers upon commercial operation in the same way that risk of loss passes upon receipt of goods in the

competitive market. Rates are then set by adding up costs, however high, and dividing by sales to obtain a rate. That end result, however expensive for ratepayers, is just and reasonable and consistent with FPC v. Hope Gas Co., 320 U.S. 591 (1944), regardless of its impact on anyone. Even so, only the law of diminishing returns will prevent a utility from charging rates so high as to actually loose sales or customers, (See Market Street R. Co. v. Comm'n, 324 U.S. 548, 565 (1945)), so we can modify our conclusion somewhat to say in New Hampshire the only real limit to rates for prudently spent investment is what the traffic will bear. Already, two major wholesale customers have had enough. See Re: PSNH, 31 F.E.R.C. para. 61,267 (1985); Re: PSNH, F.E.R.C. para. 61,251 (1985).

9. Given the foregoing just what then is an "exploitative" rate? If in New Hampshire , consistent with Hope, all the traffic will bear is permitted if Seabrook operates, we submit it is "exploitation" to allow the same end result if Seabrook does not operate and ratepayers receive nothing. Obviously if ratepayers can be charged all the traffic will bear whether a plant operates or does not operate the concept of an "exploitative" rate becomes utterly meaningless and the idea of regulation protecting ratepayers is a hoax. If that is what the law provides then the ratepayers need to be told forth rightly so the people can either change the system or adapt appropriately. But it is this Court who will have to tell the ratepayers, and before it can do so it will have to address the concept of "exploitative" rates. It cannot in all

fairness avoid answering that question if it takes this case since it is central to the concept of balancing.

Moreover, before this Court decides it can tell by direct observation alone that an "end result", separate from the process that produced it, is just and reasonable the Court should consider whether it can similarly tell when a rate is "exploitative". If it cannot do one, separate from the process, we submit it cannot do the other.

Although PSNH pays lip service to "balancing", it is the very last thing it wants this Court to consider. PSNH wants the Court to focus on its financial condition which PSNH considers the "end result". But actually the "end result" of

the New Hampshire process is a non-exploitative rate. "... [R]egulation does not insure that the business shall produce net revenues ...." FPC v. Nat. Gas. Pipeline Co., 315 U.S. 575, 590 (1942). (emphasis added). PSNH hopes the Court will conclude the process cannot possibly be balanced given PSNH's financial condition. But we submit that is like saying capitalism does not work because Braniff went under. Instead, the systems value is in allowing the failure.

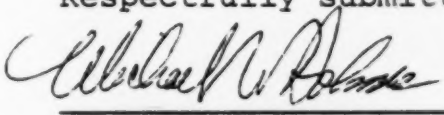
10. The OCA believes the Equity Committee's arguments have been made by Counsel of Record for the Company, and there is no need for independent representation. The Equity Committee was created on April 15, 1988, almost three months after the filing of the Chapter 11 petition, and it would appear

that its major, if not only purpose is to champion the prudency of the Seabrook investment, an issue which has not been decided despite the Committee's contentions to the contrary. See Amicus Brief at 4. While it arguably may not be "lax management" which is keeping the plant from commercial operation, it certainly was "lax management" that proceeded in the face of known risks and thereby bankrupted what is essentially a cost plus operation by putting its eggs in one basket and then putting the basket in the wrong place. See Re: PSNH, 14 N.R.C. 279 (1981), aff'd. Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1982).

WHEREFORE, on behalf of the residential utility consumers of the State of New Hampshire, the OCA requests that the Equity

Holders Motion For Leave To File Brief Amicus Curiae be denied and that any subsequent filings by Bankruptcy "Committees" denied.

Respectfully submitted,



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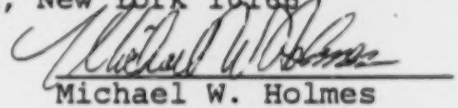
CERTIFICATE OF SERVICE

I, Michael W. Holmes, a member of the Bar of this Court, hereby certify that on the 12th day of May, 1988, three copies of the Objection of Appellee, Michael W. Holmes, Consumer Advocate, to the Motion for Leave to File Brief Amicus Curiae and Response to Brief Amicus Curiae of the Equity Security Holders of Public Service Company of New Hampshire in the above entitled case were mailed, first class postage prepaid, to Thomas R. Jones, Esq., Attorney for Appellant, 80 Pine Street, New

York, New York, 10005, Larry M. Smuckler, Esq., Assistant Attorney General, Attorney for the State of New Hampshire, State House Annex, 25 Capitol Street, Concord, New Hampshire, 03301, Robert C. Hinkley, Esq., Attorney for Campaign for Ratepayer's Rights, 1838 Elm Street, Manchester, New Hampshire, 03104, Richard N. Tilton, Esq., Attorney for Equity Commitee, 200 Park Ave., New York, New York 10166.



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